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Supreme Court, U.S.
FILED
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No. 02-1205

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,
A DELAWARE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JOINT APPENDIX

RICHARD SCHNADIG
Counsel of Record
THOMAS ABRAM
VEDDER, PRICE, KAUFMANN & KAMMHOLZ, P.C.
222 N. LASALLE STREET
CHICAGO, IL 60601-1003
(312) 609-7500

Counsel for Respondent

H. CANDACE GORMAN
Counsel of Record
CATHERINE CAPORUSSO
LAW OFFICE OF H. CANDACE GORMAN
542 S. DEARBORN, SUITE 1060
CHICAGO, IL 60605
(312) 427-2313

Counsel for Petitioners

PETITION FOR CERTIORARI FILED FEBRUARY 13, 2003
PETITION FOR CERTIORARI GRANTED MAY 19, 2003

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RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: 96-CV-7717

Jones, et al v. R R Donnelley & Sons
Assigned to: Hon. Matthew F. Kennelly
Demand: $0,000
Lead Docket: None
Jurisdiction: Federal Question

Filed: 11/25/96
Jury demand: Both
Nature of Suit: 442
Jurisdiction: Federal Question

1	11/25/1996	COMPLAINT; jury demand - Civil cover sheet – Appearance(s) of Suzanne McCarthy, H. Candace Gorman as attorney(s) for plaintiffs with Rule 39 affidavit for H. Candace Gorman only (1 original and 1 copy summons(es) issued.) (Documents: 1-1 through 1-4) [Date Entered: 12/04/96, By: ip]
10	01/08/1997	MOTION by defendant for partial summary judgment and briefing schedule ; Notice of motion [Date Entered: 01/16/97, By: nln]
102	10/26/1998	RESPONSE by plaintiffs to defendant's motion for partial summary judgment [Date Entered: 11/06/98, By: mg]

108	11/05/1998	MEMORANDUM by defendant in support of motion for partial summary judgment [107-1] (Attachments) [Date Entered: 11/06/98, By: mg]
118	12/15/1998	REPLY memorandum by defendant in support of its motion for partial summary judgment [107-1] (Attachments) [Date Entered: 12/16/98, By: cmf]
149	08/16/1999	MINUTE ORDER of 8/16/99 by Hon. Ann C. Williams : Pursuant to memorandum opinion and order dated 8/10/99 the court denies Donnelley's motion for partial summary judgment. The court also denies plaintiffs' motion to strike. Status hearing set for 9/3/99 at 9:00 a.m. (Entered Memorandum Opinion and Order). Mailed notice [Date Entered: 08/17/99, By: mg]
201	12/22/2000	MOTION by defendant for partial summary judgment; Memorandum in support (Attachments). [Date Entered: 12/26/00, By: mw]
233	04/13/2001	MEMORANDUM by defendant in support of applying a two-year limitations period under 42 U.S.C. 1981 (Attachments) [Date Entered: 04/16/01, By: ip]

235	04/13/2001	SUMMARY of argument and update on authorities regarding the four-year statute of limitations by plaintiff; Notice of filing and certificate of service [Date Entered: 04/19/01, By: rm]
244	06/08/2001	MINUTE ORDER of 6/8/01 by Hon. Matthew F. Kennelly : The reasons set forth on the attached order, the Court finds that the four-year statute of limitations in Section 1658 governs those claims created by the Civil Rights Act of1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of Section 1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective [sic] classes and Donnelley's pending summary judgment motion. Entered Memorandum Opinion and Order. No notice [Date Entered: 06/15/01, By: rm]
245	06/27/2001	MOTION by defendant to certify issue for appeal [Date Entered: 06/28/01, By: rm]

246	07/12/2001	RESPONSE by plaintiffs to defendant's motion to certify issue for appeal [245-1]; Certificate of service and notice of filing [Date Entered: 07/13/01, By: rm]
247	07/17/2001	MINUTE ORDER of 7/17/01 by Hon. Matthew F. Kennelly : Status hearing held and continued to 12/5/01 at 9:30 am. Defendant's motion for partial summary judgment is withdrawn without prejudice [201-1]. Discovery cutoff setto [sic] 7/16/02. No further extensions. Mailed notice [Date Entered: 07/19/01, By: cm]
248	07/27/2001	MINUTE ORDER of 7/27/01 by Hon. Matthew F. Kennelly : Enter order. The court grants defendant's motion to certify [245-1] and certifies for appeal under 28 USC 1292(b) the order of 6/8/01, and specifically the following question: whether [sic] in a 1996 lawsuit brought under 42 USC 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statue of limitations is the "catch-all" four year period enacted by Congress in 1990 and codified at 28 USC 1658, or the personal injury statue of limitations of the [sic] forum state. (Entered Order.)

		No notice. [Date Entered: 07/30/01, By: ls]
253	08/02/2001	NOTICE OF APPEAL by defendant pursuant USCA order dated 8/21/01 from motion minute order [249-1] ($105.00 Paid) [Date Entered: 08/29/01, By: dj]
252	08/21/2001	COPY of Order dated 8/21/01 from the 7th Circuit. It is ordered that the petition for leave to appeal is granted.(01-8026) [Date Entered: 08/24/01, By: ls]
294	03/31/2003	MINUTE ORDER of 3/31/03 by Hon. Matthew F. Kennelly : Fairness / approval hearing held regarding proposed settlement of class action aspects of Adams case (98 C 4025). Settlement is approved. Claims of members of the Chicago [sic] Financial Division, Dwight, and Pontiac subclasses of Class 3 are dismissed with prejudice and without costs, and the members of those classes are barred from prosecution claims arising from the subject matter of the allegations underlying the class claims. The claims of Classes 1 and 2 and the Chicago Manufacturing Division subclass [sic] of Class 3, all of which are a part of the Jones case (96 C

7717), remain for adjudication. All other individual claims in both Adams and Jones cases are dismissed with prejudice, except for the individual claims of [sic] Larry Hill, Carolyn Richardson, and David Armstrong. This order is final and appealable within the meaning of Federal Rule of Civil Procedure 54(b). Mailed notice [Date Entered: 04/02/03, By: rm]

Seventh Circuit Court of Appeals Docket #: 01-3271

Court of Appeals Docket #: 01-3271 Filed: 8/29/01
Nsuit: 3442 Federal Question-Employment
Jones, Edith, et al v. R.R. Donnelley Sons
Appeal from: United States District Court

- -

Lower court information:

District: 0752-1 : 96 C 7717
Court Reporter: L. Brennan, Court Reporter
Ordering Judge: Matthew F. Kennelly, Judge
Date Filed: 11/25/96
Date order/judgment: 6/8/01
Date NOA filed: 8/21/01

8/29/01 Private civil case docketed. [01-3271] [1429963-1] Transcript information sheet due 9/10/01. Appellant's brief due 10/9/01 for R.R. Donnelley Sons. Docketing Statement due 8/28/01. (squi)

9/16/02 Filed opinion of the court by Judge Ripple. REVERSED and REMANDED. Circuit Judge Kenneth F. Ripple, Circuit Judge Michael S. Kanne, Circuit Judge Terence T. Evans. [01-3271] [1429963-1] (hard)

9/16/02 ORDER: Final judgment filed per opinion. Donnelley may recover its costs on this appeal. (hard)

9/27/02 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Ellis Jackson, Appellee Dorothy J. Epps, Appellee Virginia Clark, Appellee Eunice Young, Appellee Edith Jones. Dist. [01-3271] [1551705-1] (amyd)

11/21/02 ORDER: Appellee Ellis Jackson, Appellee Dorothy J. Epps, Appellee Virginia Clark, Appellee Eunice Young, Appellee Edith Jones Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [01-3271] [1551705-1] (tiff)

12/2/02 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 5 vol. pleadings; 17 vol. loose pleadings; 15 vol. transcripts; 1 vol. exhibits;) [01-3271] [1453249-1] (stef)

Relevant Docket Entries

5/23/03	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 02-1205. [01-3271] [1626685-1] (amyd)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NO. 96 C 7717

[Filed February 7, 1997]

EDITH JONES, EUNICE YOUNG,)
VIRGINIA CLARK, DOROTHY JEAN EPPS,)
GWENDOLYN EVERETT, EVIE HAYDEN,)
ELLIS JACKSON, SR., ETHYL WILLIAMS,)
WILLIE MOORE, EDDIE MCGEE, JAMES)
NEVILS, JR., JOSEPH BEVILL, SR.,)
MARY BECKUM, CLARENCE BOLDS, EDITH)
BOWLES, CURTIS BROWN, TOM GRIFFIN,)
MARGIE HARRIS, MAURICE HAYES, ALBERT)
JACKSON, VENNIE LAWSON, RAYMOND LEWIS)
Representative Plaintiffs,)
)
VS.)
)
R.R. DONNELLEY & SONS,)
A DELAWARE CORPORATION,)
Defendant.)

JUDGE Williams
MAGISTRATE Bobrick

COMPLAINT

This suit is brought as a class action suit by current and former African American employees of RR Donnelley, to secure rights for violations of 42 USC 1981 of the Civil

Rights Act of 1871, as amended, and as amended by the 1991 Civil Rights Act (1981b), for the intentional and outrageous race discrimination against themselves and Donnelley's other African American employees. Plaintiffs seek all relief available including declaratory, injunctive, equitable and punitive relief.

JURISDICTION

1. This action arises under Title 28 U.S.C. Sections 1331, 1343(3) and (4); the Civil Rights Act of 1871, 42 U.S.C. subsection 1981, as amended by the 1991 Civil Rights Act (Section 1981(b)); and the Thirteenth Amendment of the United States Constitution.

2. Declaratory and Injunctive relief is sought pursuant to 42 U.S.C. subsection 1981 and subsection 1981 (b).

3. Liquidated, compensatory and punitive damages are sought pursuant to 42 U.S.C. subsection 1981 as amended for Plaintiffs emotional distress and to punish the defendant for its outrageous and intentional discrimination of its African American employees.

4. Costs and attorneys fees may be awarded pursuant to Federal Rule of Civil Procedure 54, and pursuant to other appropriate statutes.

VENUE

5. This action properly lies in the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. section 1391

(b), as the discriminatory acts complained of herein occurred in this judicial district.

PARTIES

6. Defendant, RR Donnelley & Sons (" RR Donnelley") is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Plaintiffs fall into two categories which overlap in some instances. All Plaintiff's are African American and all are either a.) current employees of RR Donnelley or b.) former employees of RR Donnelley (either as temporary or as permanent) in RR Donnelley's Chicago division prior to its closing on December 31, 1994. The two categories of Plaintiff classes include, but are not limited to, those from the Chicago division who were terminated prior to the announcement of the shutdown of the Chicago division and those who were terminated as a result of the shutdown the Chicago Division.

8. Defendant RR Donnelley is a "person" within the meaning of Section 1981.

9. Defendant RR Donnelley employs more than five hundred (500) employees and is an employer within the meaning of Section 1981 and is an enterprise engaged in commerce within the meaning of Section 3 ® and 3 (s) of the FLSA.

FACTS

10. In 1981 RR Donnelley initiated a "permanent workforce reduction policy" for its Chicago division. Since commencing that policy in 1981 the workforce of Donnelley nationally has more than doubled.

11. Plaintiffs, who are all African American, were or are employed in various positions with RR Donnelley and include former employees from the Chicago Division which closed on December 31, 1994.

12. That RR Donnelley maintained two workforces at its Chicago Division. One workforce was called its "permanent" workforce. The other division was called its "temporary" workforce. The temporary workforce comprised of approximately 30% of the total workforce in the Chicago division in January, 1993.

13. The word "temporary" takes on new meaning when used to describe the "temporary" employees of RR Donnelley. Many of the employees who were categorized as "temporary" worked for RR Donnelley for 5, 10, 15 and 20 years or more. The "temporary" employees were not given the same benefits as "permanent" employees. The temporary employees did, however, share something in common and that was their race. Ninety-four point three percent (94.3%) of the "temporary" employees at the Chicago division were African American in January, 1993.

14. That Donnelley classified those African American employees as "temporary" in a deliberate and discriminatory fashion to deprive that workforce, which was 94.3% African

American, of the same benefits of the permanent workforce, despite the fact that these employees were not really temporary and in fact had in many cases worked for Donnelley longer than white employees which Donnelley classified as "permanent".

15. That Donnelley also maintained a workforce of "permanent" employees. Approximately 59% of the permanent workforce was white.

16. During the course of their employment, Plaintiffs (both "permanent" and "temporary") performed their job duties in an exemplary manner which met the reasonable expectations of the Defendant.

17. Starting in approximately February, 1993 Donnelley commenced a course of action to close its Chicago division. The closedown of that facility was completed on December 31, 1994.

18. Donnelley fired all of its "temporary" workers, of which 94.3% were African American, in February, 1993 as a result of its decision to close the Chicago division.

19. That the decision to fire its "temporary" workforce was part of a pattern and practice of RR Donnelley to discriminate against its African American employees at the Chicago division and elsewhere.

20. That RR Donnelley also selected certain permanent employees for termination.

21. That RR Donnelley used race (and other discriminatory criteria) as a criteria for deciding which permanent employees would be transferred to other locations and which would be terminated. In using race RR Donnelley decided that it would not transfer, to its other locations, its African American employees. In fact, of the employees who were transferred by RR Donnelley to other locations, only 1.2% were African American.

22. That this decision to not transfer its "permanent" African American workforce was part of a pattern and practice of RR Donnelley to discriminate against its African American employees at the Chicago division and elsewhere which continued through the final closure of that facility on December 31,1994 and continues to this day.

23. That out of RR Donnelley's workforce of approximately 1,000 employees in the Chicago division in January, 1993, approximately 400 were white. Thirty one percent (31%) of those white employees were secretly transferred to other locations.

24. That out of RR Donnelley's total workforce of approximately 1,000 employees in its Chicago division in January, 1993, 575 of those employees were African American. Only seven (7) of Donnelley's 575 African American employees (or 1.2%) were transferred to other locations. The difference between this number and the 31% of white employees that were transferred to other locations is highly statistically significant. The statistical likelihood of this phenomena occurring by chance is substantially less than .0000000000000000000000000000000000000175 (substantially less than 1 in one trillion but there is no word

in mathematics to describe this number). This difference is the equivalent of approximately 14.3 standard deviations. In fact the statistical likelihood of this event occurring by chance is less than the likelihood of being the sole winner of a world lottery on four(4) consecutive Saturdays in which every man, woman and child on earth today buys a ticket. In fact, mathematicians do not have a word for the number in this case other than to call it 10^{-38} and to describe it as dramatically smaller than a fraction of an atom. In other words, the likelihood that Donnelley's actions, in terminating all but seven of its black employees and transferring 31% of its young white employees, is anything other than intentional race discrimination is smaller than a fraction of an atom.

25. At the time of the announcement that RR Donnelley would be closing its Chicago division, RR Donnelley changed its existing long-standing policy which had allowed for bumping on the basis of seniority. Employees were told there would be no opportunity for bumping. This change in policy allowed Donnelley to pick and choose employees it would transfer based on discriminatory criteria. RR Donnelley took full advantage of its discriminatory opportunity and intentionally and systematically excluded African Americans when it hand picked the employees it transferred to its other locations.

26. At the same time RR Donnelley was firing 98.2% of its African American workforce in the Chicago division because of the closure of that facility, RR Donnelley's total workforce was, and continues, to increase dramatically with non African American employees.

27. At the same time RR Donnelley was firing 98.8% of its African American workforce in the Chicago division because of the closure of that facility RR Donnelley was increasing the workforce in its other divisions near and around the Chicago area and the nation with non-African American employees.

28. That the actions of RR. Donnelley in closing the Chicago division and in only transferring its young white employees followed a pattern and practice of race (and other) discriminatory policies by RR Donnelley and was an intentional and deliberate action to rid RR Donnelley of its large workforce of African American employees, both "temporary" and "permanent".

29. That management at RR Donnelley consistently referred to the high number of African Americans at the Chicago division as the "black problem" and management employees were rewarded monetarily and otherwise for "containing" the "black problem" at the Chicago division at various times prior to the closure of that division.

30. Among the African American employees that RR Donnelley selected for termination were excellent and outstanding employees with many years of successful service to RR Donnelley, and many of them had longer tenure and were better performers than the white employees who were secretly transferred by RR Donnelley to other locations.

31. That RR Donnelley engaged in the foregoing pattern and practice of discrimination on the grounds of race, willfully, intentionally and with reckless disregard for the

rights of its employees to be free from discrimination on the grounds of race.

32. This case is properly maintainable as a class action or under Fed. R. Civ. P. 23(a), for the following reasons:

The class for whose benefit the action is brought is so numerous that joinder is impracticable.

There are questions of law or fact common to the class involving defendant's acts and omissions.

Plaintiffs' claims are typical of the claims of class members.

d. Plaintiffs will fairly and adequately protect the interests of the class and has retained counsel competent and experienced in employment discrimination.

33. The class should be certified under Fed. R. Civ. P. 23(b)(2) because defendants have acted or refused to act on appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole.

34. The class alternatively should be certified under Fed. R. Civ. P. 23(b)(3) because common questions predominate over any questions affecting only individual class members. Further, a class action in this instance is superior to other available methods for the fair, economic and effective adjudication of this controversy.

RACE DISCRIMINATION
SECTION 1981

35. Plaintiffs reallege paragraphs 1-32 as paragraphs 1-32 of this Count.

36. Through RR Donnelley's actions and those of its employees and agents, in refusing to transfer and in terminating all but an infinitesimal number of its African American employees at the Chicago division, RR Donnelley has exhibited discriminatory treatment in the terms and conditions of the Plaintiffs employment based solely on the race of the Plaintiff's which is African American.

37. Through its actions in imploring a classification system of "temporary" employees comprised predominantly (94.3%) of African Americans, who were subject to lesser pay and benefits than "permanent" employees, RR Donnelley, through its agents and employees, has exhibited discriminatory treatment against those temporary employees in the terms and conditions of their employment based solely on the race of the Plaintiffs which is African-American.

38. Through its actions, including but not limited to those described herein, RR Donnelley treated all of the Plaintiffs in a discriminatory manner by condoning and fostering an atmosphere of racial intolerance against the Plaintiffs because of their race and in subjecting the plaintiffs to less favorable treatment than its white employees.

39. Through its actions, RR Donnelley and its agents and employees, intentionally discriminated against Plaintiffs on account of their race and color by denying to each of them

equal terms and conditions of employment because of their race.

40. Through its actions, RR Donnelley and its agents and employees, have deprived Plaintiffs of their right to employment and to their right to equal employment with RR Donnelley because of their race and color.

41. Through its actions, RR Donnelley and its agents and employees have deprived the Plaintiffs of their dignity, humanity and sense of justice and fairness, because of their race and color.

42. RR Donnelley's actions, as described herein with respect to the Plaintiffs constituted a malicious or reckless indifference to the Plaintiffs federally protected rights and RR Donnelley was intentionally discriminatory in violation of the federal anti-discrimination laws.

43. As a proximate result of the practices alleged herein, the Plaintiffs have and will continue to suffer, a substantial loss of wages, fringe benefits and other monetary benefits, and extreme mental pain, suffering and humiliation.

WHEREFORE, Plaintiffs respectfully request the Court grant Plaintiffs the following relief:

a. Trial by Jury on the charges raised in this complaint;

b. That a declaratory judgment be issued that Plaintiffs rights have been violated as alleged above and that the practices complained of herein are unlawful and violative of the Acts cited.

c. Permanently enjoin RR Donnelley, its agents, successors, officers, employees and attorneys and those acting in concert with it or them from engaging in each of the unlawful practices, policies, customs, and usage's set forth herein, and from continuing any and all other practices shown to be in violation of applicable law.

d. That Plaintiffs have and recover from RR Donnelley any and all benefits, wages, backpay, transfer and reinstatement, front pay, with pre- and post-judgment interest, actual, compensatory, consequential and punitive damages and any other damages to which Plaintiffs might be entitled; liquidated damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish and other non-pecuniary losses in an amount not less than FIVE HUNDRED MILLION DOLLARS ($500,000,000).

e. Award Plaintiffs the costs and disbursements of this action, including reasonable attorneys' fees under any and all applicable fee shifting statutes.

f. For such other and further relief as this Court deems just and proper.

JURY DEMAND

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS.

RESPECTFULLY SUBMITTED,

_____

One of the
ATTORNEYS FOR PLAINTIFFS

H. CANDACE GORMAN
542 South Dearborn
Suite 1060
Chicago, IL 60605
(312) 427-2313

SUZANNE MCCARTHY
of Counsel, Chuhak and Tecson, P.C.
225 West Washington
Suite 1300
Chicago, IL 60606
(312) 444-9300

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 98 C 4025, Case No. 96 C 7717

[Filed June 8, 2001]

JONATHAN ADAMS, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS, a Delaware Corporation,
Defendants.

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS,
Defendant.

JUDGES:
MATTHEW F. KENNELLY, United States District Judge.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In these consolidated suits, the plaintiffs, current and former African-American employees of R.R. Donnelley &

Sons, a printer and provider of information services and logistics, allege employment discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) & 3(a). The Court recently certified three classes of plaintiffs: the first consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division"; the second consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.)"; and the third consists of "All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Chicago Financial Division; or (c) the Chicago Manufacturing Division from November 1992 to the present and were subject to racial harassment so pervasive as to create a hostile working environment." *See Adams v. R.R. Donnelley*, 2001 U.S. Dist. LEXIS 4247, *69, Nos. 98 C 4025, 96 C 7717, *2001 WL 336830,* at *20 (N.D. Ill. Apr. 6, 2001).

The parties have urged the Court to consider and resolve a single issue--the appropriate statute of limitations to be applied to plaintiffs' claims--arguing that resolution of this issue will in turn govern how the parties proceed on summary judgment and ultimately at trial. As framed by the parties, the question presented is whether the appropriate statute of limitations is the four-year period contained in 28 U.S.C. § 1658 (what has been referred to as the federal "catch-all"

statute of limitations) or the two-year statute of limitations that governs personal injury actions in Illinois.

FACTUAL BACKGROUND

This is not the first time the statute of limitations issue has been raised in this case. Before the cases were consolidated, Donnelley moved for partial summary judgment in the *Jones* case on the ground that the claims relating to its Chicago Manufacturing Division and the claims of many of the named plaintiffs were time-barred, filed after the expiration of what Donnelley argued was the applicable statute of limitations: Illinois' two-year personal injury statute of limitations. The plaintiffs opposed the motion, arguing (among other things) that the applicable statute of limitations was the four-year catch-all period contained in § 1658. Magistrate Judge Ian Levin concluded that § 1658, by its plain language, applied only to Acts of Congress *enacted* after December 1990, not Acts *amended* after December 1990, *Jones v. R.R. Donnelley*, 1999 U.S. Dist. LEXIS 1592, No. 96 C 7717, 1999 WL 33257839, at *9 (N.D. Ill. Feb. 11, 1999); because "the addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658," Judge Levin reasoned, § 1658 did not apply to the plaintiffs' claims. *Id.* Judge Levin therefore recommended that Judge Williams grant Donnelley's motion for partial summary judgment with respect to all claims relating to the operation and shutdown of the CMD and all the named plaintiffs identified and designated by the defendant in its motion. *Id.* at *12.

The plaintiffs objected to the magistrate's report and recommendation, Donnelley responded, and ultimately Judge Williams denied the summary judgment motion, though she did so on non-statute-of-limitations grounds and indeed stated that the Court "expressed no opinion on the correctness of Judge Levin's analysis of . . . the applicability of 28 U.S.C. § 1658's four-year statute of limitations to actions brought under 42 U.S.C. § 1981 (b)." *Jones v. R.R. Donnelley, 1999 U.S. Dist. LEXIS 1592,* No. 96 C 7717, *1999 WL 639180,* at *2 (N.D. Ill. Aug. 17, 1999). In short, we are essentially writing on a clean slate on the statute of limitations issue, though, as discussed below, we are hardly the first court to consider the question.

DISCUSSION

Before 1991, § 1981 read as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute, as then written, protected just two rights: the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise

later from the conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). The Civil Rights Act of 1991, which became law (i.e., was enacted) on November 21, 1991, revised § 1981, making the above-quoted language subsection (a) and adding two more subsections: subsection (b), which defined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and subsection (c), which made the section applicable to private entities. In other words, the version of § 1981 in the 1991 Act created new causes of action that were not cognizable under the pre-1991 version of the statute.

Because § 1981 does not contain a statute of limitations, courts considering claims under § 1981 for civil rights violations historically have applied the state personal injury statute of limitations, *see Goodman v. Lukens Steel Co.*, 482 U.S. 656, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987); *Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), which in Illinois is two years, 735 ILCS 5/13-202. The question for the Court is whether this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. § 1658, the federal "catch-all" statute of limitations. Section 1658 provides that "except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the

date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Looking at the plain language of § 1658, this seems to this Court to be an easy question to answer, though judging by the panoply of ways in which the question has been framed and answered this is apparently a minority view. The Seventh Circuit has yet to address the question of whether § 1658 governs claims brought under the 1991 Act; in fact only one circuit court, the Third, has actually considered, analyzed and answered the question. In *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3rd Cir. 2000), the court held that § 1658 applies "only when Congress establishes a new cause of action without reference to preexisting law. . . ." Thus, because Congress "chose to build upon a statutory text that has existed since 1870," the court held, "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." *Id.* at 226. The Court cannot imagine how this is possible; in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by Zubi (discriminatory firing) *did not* arise under the pre-1991 version of § 1981. *See Patterson*, 491 U.S. at 177 ("the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established . . . ."). Rather, such claims can be made only by virtue of Congress' 1991 enactment of § 1981(b).

The Sixth Circuit has acknowledged that this issue exists, though it has not yet decided whether § 1658 actually applies to § 1981 claims. In one case, the district court applied Kentucky's personal injury statute of limitations to the

plaintiff's § 1981 claims without considering § 1658, and the Sixth Circuit remanded with instructions to do so. *Young v. Sabbatine*, 1998 U.S. App. LEXIS 5774, No. 97-5169, 1998 WL 136559, at *3 (6th Cir. March 19, 1998). On remand, the district court found that § 1658 governed the claims, and although the parties tried to argue the issue on appeal, the Sixth Circuit concluded that it lacked jurisdiction to consider the question because the party with standing to do so failed to file a notice of cross-appeal. *Young v. Sabbatine*, 2000 U.S. App. LEXIS 33891, *6, No. 99-6336, 2000 WL 1888672, at *2 n.2 (6th Cir. Dec. 19, 2000).

The Tenth Circuit, interestingly, has applied the state's personal injury statute of limitations to § 1981 claims without so much as discussing the possibility that § 1658 might come into play, *see Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523 (10th Cir. 1995); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998), which seems odd given that a number of district courts in that circuit *have* considered and resolved the issue--to conflicting ends. *Compare Alexander v. Precision Machining, Inc.*, 990 F. Supp. 1304 (D. Kan. 1997) (holding that § 1658 applies to claims arising out of the 1991 Act), *with Mason v. Anadarko Petroleum Corp.*, 1998 U.S. Dist. LEXIS 4745, No. 97-1051, 1998 WL 166562 (D. Kan. 1998); *Lasley v. Hershey Foods Corp.*, 35 F. Supp. 2d 1319 (D. Kan. 1999); and *Hall v. Flightsafety International, Inc.*, 106 F. Supp. 2d 1171 (D. Kan. 2000) (all holding that § 1658 does not apply to § 1981 claims, even those arising under the 1991 Act). The Tenth Circuit *has* considered § 1658's impact in the context of a § 1983 claim, however, and concluded that the statute would not apply because the 1996 amendment to §

1983--which merely added a right to seek injunctive relief--did not create a cause of action. *See Laurino v. Tate*, 220 F.3d 1213, 1217-18 (10th Cir. 2000). Applying this reasoning to § 1981, one would think the Tenth Circuit would conclude that § 1658 would apply to claims arising under § 1981(b), a post-§ 1658 enactment that *does* create a cause of action--though this is by no means a foregone conclusion.

In addition to these circuit court cases, there are about twenty-five district court decisions on the issue. A catalogue of these decisions is recounted and summarized in many of the decisions, and we will not reiterate it here. Suffice it to say, the courts have split on the issue: some (the majority) have held that § 1658 does not apply to any § 1981 claim, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see, e.g., Coleman v. Shoney's, Inc.*, 145 F. Supp. 2d 934, 2001 WL 526673 (W.D. Tenn. 2001); *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1269 (M.D. Ala. 1998); *Hall*, 106 F. Supp. 2d 1171; *Hardin v. CNA Insurance Companies*, 103 F. Supp. 2d 1091 (S.D. Ind. 1999); some have held that § 1658 applies to all § 1981 claims, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d 974 (W.D. Ky. 1999); *Miller v. Federal Express Corp.*, 56 F. Supp. 2d 955 (W.D. Tenn. 1999); and some have concluded that § 1981 claims may be governed by both § 1658 and the applicable state personal injury statute of limitations, depending on whether the particular claim arises under the 1991 Act or a pre-1991 version of the Act, *see Alexander*, 990 F. Supp. 1304; *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 1998 U.S. Dist. LEXIS 4458,

No. 97 C 2225, 1998 WL 156674 (N.D. Ill. March 31, 1998) (same result as applied to the Telecommunications Act of 1996). We think the last holding is the only one true to the language of the statute.

Judicial inquiry into the applicability of [§ 1658] begins and ends with what [§ 1658] does say and with what [§ 1658] does not." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992). Section 1658 applies to any "civil action arising under an Act of Congress enacted" after December 1, 1990. We see nothing ambiguous in this language, at least as it relates to the claims at issue in this lawsuit. First, although some courts have found otherwise, *see, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *4; *Lane*, 13 F. Supp. 2d at 1270; *Davis v. State of California Department of Corrections*, 1996 U.S. Dist. LEXIS 21305, *57, No. S-93-1307DFL GGH, 1996 WL 271001, at *18-*19 (E.D. Cal. 1996), we do not think the statute's reference to "an Act of Congress enacted" is susceptible to more than one reasonable interpretation. "Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." *See also Rodgers*, 35 F. Supp. 2d at 976 ("All legislative actions of Congress, regardless of form, become law through an enactment by Congress and approval by the President."). To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight. Congress specifically used both words in the law's preamble:

An *Act* to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it *enacted* by the Senate and House of Representatives of the United States of America in Congress assembled, . . . Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added).

Second, there is no question that "civil action" as used in § 1658 means "claim" or "cause of action." *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New 'General' One in Federal Question Cases*, 134 F.R.D. 481, 487 (1991). Finally, there is no question that "arising under" means "stemming from" or "originating in". *See Black's Law Dictionary* 102 (7th ed. 1999).

In short, the meaning of § 1658 is quite simple: whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action. As applied to § 1981, claims that under *Patterson* could be brought under the pre-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims. Claims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658. Section 1658 applies to those claims. Having concluded that the language

of the statute is unambiguous, we need not consider the statute's legislative history. *See Germain*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

The only other district judge in this Circuit who has addressed this issue concluded that § 1658 does not apply to any claims under § 1981, including claims given life by § 1981(b); it relied in part on legislative history that it read as indicating that Congress did not view the Civil Rights Act of 1991 as creating any new causes of action, but rather as "restoring" § 1981 to its proper scope following the Supreme Court's decision in *Patterson*. *Hardin*, 103 F. Supp. 2d at 1095. This Court does not agree. First, as indicated above, resort to legislative history is inappropriate where, as here, the language of the statute is unambiguous. But more importantly, whatever label Congress chose to give to its enactment, it was not "restoring" § 1981, it was changing it. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), and in *Patterson* the Supreme Court determined not that § 1981 should be narrowed despite its original intent, but rather that the statute, as enacted in 1866, was never meant to reach certain forms of conduct. *Patterson*, 491 U.S. at 176-77. When Congress enacted § 1981(b), it thus undeniably created new causes of action, whether or not that is how it chose to label what it had done.

A number of courts have noted that our interpretation would result in courts applying two different statutes of limitations for every federal statute enacted prior to December 1, 1990 and amended thereafter to create new types of claims. *See, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *5; *Davis*, 1996 U.S. Dist. LEXIS 21305, 1996 WL 271001, at *19. The answer to that is three-fold. First, the Court has not been asked to decide whether § 1658 governs every post-1990 legislative amendment; the Court must decide only whether the statute governs the claims raised by these plaintiffs in this lawsuit. Second, courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit. And third, even if applying multiple statutes of limitations is inconvenient, that is what Congress has required, and the courts are not at liberty to second guess an unambiguous statute.

To summarize, the Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, *see Patterson*, 491 U.S. at 176-77, and are therefore governed by

§ 1658's four-year statute of limitations. The claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling.

CONCLUSION

For the reasons explained above, the Court finds that the four-year statute of limitations in § 1658 governs those claims created by the Civil Rights Act of 1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of § 1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective classes and Donnelley's pending summary judgment motion.

Dated: June 8, 2001

MATTHEW F. KENNELLY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7717

[Filed June 27, 2001]

EDITH JONES, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
R.R. DONNELLEY & SONS, a Delaware corporation,	)
	)
Defendant.	)
	)

Judge Matthew F. Kennelly

MOTION TO CERTIFY ISSUE FOR APPEAL

Now comes Defendant R.R. Donnelley & Sons Company ("Donnelley"), and pursuant to 28 U.S.C. § 1292(b), respectfully requests the Court to certify for appeal the issue of whether the four-year statute of limitations contained in 28 U.S.C. § 1658 applies to claims asserted under the Civil Rights Act of 1991. In support of his motion, Donnelley shows the Court as follows:

1. 28 U.S.C. § 1292(b) provides in pertinent part as follows:

> (b) When a district judge in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

2. The issue which Donnelley seeks to have certified here is a textbook example for 28 U.S.C. § 1292(b) application. First, it clearly involves "a controlling question of law" which will have to be resolved on appeal at one stage or another of this litigation. Second, there clearly "is substantial ground for difference of opinion." As recognized by this Court in its Memorandum Opinion and Order, this Court has adopted a minority position contrary to the only appellate decision directly on point, *Zubi v. AT&T Corp.*, 219 F.3d 220 (3rd Cir. 2000), contrary to the majority of district court decisions arising in other circuits (see Memo. Op. At 6-7), and contrary to the only other district court decision in this Circuit, *Hardin v. CNA Insurance Companies,* 103 F. Supp. 2nd 1091 (S.D. Ind. 1999). Third, there can be little question that a prompt appellate resolution may materially advance the ultimate disposition of this litigation. In particular, Donnelley asserts that should the Seventh Circuit rule that § 1658 is inapplicable to the Class 1 claims, those claims should be dismissed as untimely without the necessity of trial.[1] Final

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[1] Contemporaneously, Donnelley has withdrawn its pending motion for partial summary judgment except with respect

resolution of the limitations period at this stage would therefore serve the dual purposes of judicial economy and timely disposition of the central aspect of this litigation.

3. Final resolution of the applicable statute of limitations in this case will also immediately impact every other aspect of this litigation, including class notice, the scope of discovery, dispositive motions and trial. Indeed, not only does this Court's decision leave open issues of timeliness with respect to the claims asserted by Class 2 (see Memo. Op. at 10)[2], but, under the June 8 Order, the Court further would be required to perform an individual analysis with respect to the applicable limitations period for each claim asserted by each individual Plaintiff, a daunting task at best and one that should not be undertaken unless and until absolutely necessary.

4. Donnelley believes that there is no question that it is in the interests of proper utilization of judicial resources for the Court to certify this issue for prompt appellate review rather than run the risk of having needlessly undertaken the painstaking task of sorting out the viability of

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to Class 2 claims, but will renew it if the Seventh Circuit rules against application of 28 U.S.C. § 1658.

[2] In its June 8, 2001 Memorandum Opinion and Order, the Court held that § 1658 does not apply to claims arising under "the pre-1991 version of § 1981" and that such claims continue to be governed by Illinois' two-year personal injury statute of limitations. Donnelley does not seek certification of this portion of the Court's ruling because it demonstrates in a separate memorandum that the two-year limitations period applies to the claims asserted by Class 2 herein under this Court's own rationale.

each and every individual claim for discovery, motion practice and maybe even trial, especially since the issue is certain to be appealed I unless otherwise resolved by the Seventh Circuit prior to final disposition of this case.

5. Finally, the issue which Donnelley seeks to have certified is one of general importance which will have to be resolved by the Court of Appeals at some point. As stated above, this Court's decision creates a split within this circuit, and it would be a further waste of scarce judicial resources for every district judge to decide the issue independently and (given the obvious differences of opinion so far) for at least some cases to require remand and retrial after the Seventh Circuit has spoken.

6. There are no substantial arguments against the certification requested by Donnelley here because interlocutory appeal will advance rather than delay ultimate disposition of this litigation.

WHEREFORE, Donnelley, respectfully requests the Court to certify for appeal the issue of whether the four-year statute of limitations contained in 28 U.S.C. § 1658 applies to claims asserted under the Civil Rights Act of 1991.

Respectfully submitted,

R.R. DONNELLEY & SONS COMPANY

By: /s/ _____
One of its Attorneys

IN THE NORTHERN DISTRICT OF ILLINOIS
UNITED STATES DISTRICT COURT
EASTERN DIVISION

Case No. 96 -C-7717

[Filed July 12, 2001]

EDITH JONES, et al.,

Plaintiffs,

v.

R.R. DONNELLEY & SONS

Defendant.

Judge Matthew F. Kennelly

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO CERTIFY ISSUE FOR APPEAL

Now come the Plaintiffs, by and through their counsel, and respond to defendant's Motion to Certify issue for appeal as follows:

Defendant in its Motion seeks to certify the issue of whether the four-year statute of limitations contained in 28 U.S. § 1658 applies to Plaintiffs 1981 (b) action. In its Motion, however, Donnelley states that it did not wish to certify the question as to whether Class 2 Plaintiffs fall under the post 1991 act or the pre 1991 act. Class 2 plaintiffs are the temporary employees whom Plaintiffs contend were

discriminated against on the basis of their status and classification as temporary employees. Defendant contends that the claims of the temporaries could have been maintained under Section 1981 prior to the Civil Rights Act of 1991, and therefore under this Court's ruling could not benefit from the four-year statute of limitations. Plaintiffs believe that the cause of action for the temporaries could not have been maintained prior to the enactment of the 1991 Civil Rights Act. P1aintiffs' counsel has conferred with defense counsel regarding this issue, and defense counsel are now in agreement that both issues should be certified for appeal.

Plaintiffs are in agreement that both issues should be certified for appeal however Plaintiffs disagree with the reasons set out by defendant. Defendant contends that this Court would be required to perform an individual analysis with respect to the applicable limitations period for each claim asserted by each individual plaintiff. This is hogwash. There are eight forms of discrimination asserted by the Plaintiffs, they are: promotion, demotion, harassment, discharge (which includes RIF's), discipline, pay, training, retaliation, and status. Under this Court's ruling the Court would be required to decide which, if any, of these forms of discrimination could have been asserted under § 1981 prior to the Civil Rights Act of 1991.[1] For each of those claims, which were not cognizable until the Civil Rights Act of 1991, the statute of limitations would be November 25, 1992. The statute of limitations for

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[1] Plaintiffs contend that none of these forms of discrimination could have been maintained under § 1981 prior to the Civil Rights Act.

any claim that the court finds could have been filed prior to the Civil Rights Act of 1991 would be November 25, 1994.

However, one of the three classes certified by this Court could fall if the four-year statute does not stand. The vast majority of the class members are from the CMD and it is fair to say that much of the discovery will be focused on the practices of that division. Plaintiffs agree with defendant in that the final resolution of this issue has an immediate impact on every aspect of this litigation, including the class notice, the scope of discovery, dispositive motions and trial. It makes sense at this juncture to ask the Seventh Circuit to weigh in on the crucial issue as to the statute of limitations for the classes.

Therefore, for the reasons stated herein Plaintiffs ask this Court to certify for appeal the question as to whether the four-year statute of limitations contained in 28 U.S.C. § 1658 applies to § 1981 (b) of the Civil Rights Act of 1991 and whether the temporary employee's claims of discrimination based on their status and classification are subject to that same four year statute of limitations.

Respectfully Submitted,

/s/ _____
Class Counsel

LAW OFFICE OF H. CANDACE GORMAN
H. Candace Gorman
Catherine Caporusso
542 South Dearborn
Chicago, IL 60605
312-427-2313

SPRIGGS & DAVIS, P.A.
Kern Spriggs
324 West College Avenue
Tallahassee, FL 32301

IN THE NORTHERN DISTRICT OF ILLINOIS
UNITED STATES DISTRICT COURT
EASTERN DIVISION

Case No. 96 - 7717

Judge Matthew F. Kennelly

EDITH JONES, et al.,

Plaintiffs,

v.

R.R. DONNELLEY & SONS

Defendant.

CERTIFICATE OF SERVICE AND NOTICE OF FILING

TO: Thomas Abram
Richard Schnadig
VEDDER PRICE
222 N. LaSalle, Suite 2600
Chicago, IL 60601

Grady B. Murdock
J. Paula Roderick
EARL L. NEAL & ASSOCIATES
111 W. Washington St., Suite 1700
Chicago, IL 60602

District Court Response to Motion - 7/12/01

I, Catherine Caporusso, certify that I filed with the Court and served a copy of the attached Plaintiffs' Response to Defendants Motion to Certify Appeal, upon the above on this 12th day of July 2001 via FIRST CLASS MAIL.

_____
Attorney for Plaintiffs

LAW OFFICE OF H. CANDACE GORMAN
H. Candace Gorman
Catherine Caporusso
542 S. Dearborn St., Suite 1060
Chicago, IL 60605
(312) 427-2313

KENT SPRIGGS
Spriggs & Davis
324 W. College Ave.
Tallahassee, FL 32301
(850) 224-8700

United States District Court,
Northern District of Illinois

Judge Matthew F. Kennelly

No. 96 C 7717

[July 27, 2001]

Jones vs. R.R. Donnelley and Sons

(10) X [Other docket entry] Enter Order. The Court grants defendant's motion to certify (245-1) and certifies for appeal under 28 USC § 1292(b) the order of 6/8/01, and specifically the following question: whether in a 1996 lawsuit brought under 42 USC §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the"catch-all" four year period enacted by Congress in 1990 and codified at 28 USC § 1658, or the personal injury statute of limitations of the forum state.

(11) X [For further detail see order attached to the original minute order.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7717

[July 27, 2001]

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY AND SONS,
Defendant.

ORDER

MATTHEW F. KENNELLY, District Judge:

In the Court's Memorandum Opinion and Order of June 8, 2001, the Court ruled that the four-year statute of limitations in 28 U.S.C. §1658 governs the claims under 42 U.S.C. §1981 brought by the Class 1 plaintiffs (wrongful termination/failure to transfer) and the Class 3 plaintiffs (hostile work environment), rather than the two year statute of limitations governing Illinois personal injury claims. Defendant has moved the Court to certify the order for appeal under 28 U.S.C. §1292(b). Plaintiffs agree that the order should be certified for appeal.

The Court finds that the criteria for immediate appeal under § 1292(b) have been met. First, the issue of which

statute of limitations applies to the claims in question is a "controlling question of law" within the meaning of § 1292(b). If a two year statute of limitations applies to the plaintiffs' claims, that may well be dispositive of those claims.[1] Second, the issue is one "as to which there is substantial ground for difference of opinion." As discussed in the Court's Memorandum Opinion and Order, disagreement is rife among the district courts that have considered this issue, and this Court's ruling conflicts with the only Circuit-level decision, *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000). Third, an immediate appeal is likely to materially advance the ultimate resolution of this litigation. In addition to the possibility that a ruling that the appropriate statute of limitations is two years may dispose of these plaintiffs' claims, determination of these issues is likely to have an immediate impact on almost every aspect of this case, including the content of class notice *(i.e.,* the class opening date); the scope of discovery (estoppel issues, *see* fn. 1 *supra);* and the scope of the evidence to be heard at trial. Finally, the issues are of general public importance. Because actions under § 1981 are not uncommon, disputes over the appropriate statute of limitations are bound to recur, and it would be beneficial to parties and the district courts to have definitive guidance from the Court of Appeals.

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[1] It should be noted that plaintiff maintain that the Class 1 claims should survive, based on allegations of estoppel, even if a two year statute of limitations applies. If the applicable period is four years, however, the plaintiffs and the Court will be able to forego the burdensome and time-consuming task of examining the estoppel issue, possibly on a plaintiff-by-plaintiff basis.

The Court therefore grants defendant's motion to certify [Item 245-1] and certifies for appeal under 28 U.S.C. §1292(b) the order of June 8, 2001, and specifically the following question: whether in a 1996 lawsuit brought under 42 U.S.C. §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

/s/ _____
MATTHEW F. KENNELLY
United States District Judge

Date: July 27, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. ____

Case No. 96C7717

[Filed August 2, 2001]

EDITH JONES, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
R.R. DONNELLEY AND SONS,	)
a Delaware Corporation,	)
Defendant.	)
	)

Judge Matthew F. Kennelly

DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRAP 5

Defendant, R.R. Donnelley & Sons ("Donnelley"), hereby petitions this Court, pursuant to Rule 5 of the Federal Rules of Appellate Procedure, for permission to appeal the question of the appropriate statute of limitations to be applied to this lawsuit brought under 42 U.S.C. § 1981 as certified for immediate appeal by the District Court under 28 U.S.C. § 1292(b) on July 27, 2001.

I. CASE HISTORY AND ISSUE PRESENTED

This action alleging race discrimination in employment under 42 U.S.C. § 1981 was commenced on November 25, 1996.

The vast majority of the Plaintiffs worked at Defendant's Chicago Manufacturing Division ("CMD") and were terminated from their employment on or before July 29, 1994 in connection with the closing of that facility.

By Order dated March 7, 2001, the District Court certified three classes, two of them limited to former CMD employees, under Federal Rule of Civil Procedure 23 as follows:

Class 1: All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division;

Class 2: All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc,);

Class 3: All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Pontiac division; (e) the Chicago Financial Division; or (d) the Chicago Manufacturing Division from November 1992 to the present and were subjected to racial harassment so pervasive as to create a hostile working environment ((a), Ca), (c), and (d) are each separate subclasses).

Donnelley filed a Motion for Summary Judgment seeking dismissal of all claims by former CMD employees (including all Class 1 and 2 claims as well as the harassment claims of former CMD employees in Class 3) on the ground that their November 25, 1996 action is untimely because it was filed beyond the two-year Illinois personal injury statute of limitations previously applied by this Court to Section 1981 claims. *See, e.g. Vakharia v. Swedish Covenant Hospital,* 190 F.3d 799, 807 (7th Cir. 1999), *cert. denied,* 530 U.S. 1204 (2000).

By Memorandum Opinion and Order dated June 8, 2001 attached hereto as Exhibit A, the District Court ruled that the four-year federal "catch all" statute of limitations contained in 28 U.S.C. § 1658 applies to the Class 1 and 3 claims. The District Court reasoned that the termination and harassment claims asserted by these classes were not actionable under Section 1981 after *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) and before passage of the Civil Rights Act of 1991 and, therefore, constituted a civil

action under an Act of Congress "enacted" after December 1, 1990 to which the Section 1658 limitations period applies. The District Court further ruled, however, that the two-year Illinois personal injury statute of limitations continues to apply to claims which could have been raised under the pre-1991 version of Section 1981, expressed uncertainty as to whether Class 2 claims wore actionable post-*Patterson* and pro-1991 Civil Rights Act, and reserved ruling on which statute of limitations applied to Class 2 claims.

By Order of July 27, 2001 attached hereto as Exhibit B, the District Court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) its statute of limitations ruling with the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

The District Court has not certified for appeal the question as to whether, under the analysis articulated in its June 8, 2001 Memorandum Opinion and Order, the two or four-year statute of limitations applies to the Class 2 claims.

II. JURISDICTIONAL BASIS FOR APPELLATE REVIEW

28 U.S.C. § 1292(b) provides as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

III. APPELLATE GUIDANCE WILL MATERIALLY ADVANCE TERMINATION OF THIS CASE

Donnelley believes that the District Court is in error and the two-year Illinois personal injury statute of limitations applies to all claims asserted in this case, including those which could not have been raised under the pre-1991 version

of 42 U.S.C. § 1981, with the result that the vast majority of this case, including entire classes of claims, is barred as untimely.[1]

The issue which the District Court certified here is a textbook example for 28 U.S.C. § 1292(b) appellate review. First, deciding the applicable statute of limitations clearly involves "a controlling question of law" which will have to be resolved on appeal at one stage or mother of this litigation. Second, there clearly "is substantial ground for difference of opinion." The District Court in its Memorandum Opinion and Order adopted a minority position contrary to the only appellate decision directly on point, *Zubi v. AT&T Corp.*, 219 F.3d 220 (3rd Cir. 2000), contrary to the majority of district court decisions arising in other circuits, and contrary to the only other district court decision in this Circuit, *Hardin v. CNA Insurance Companies,* 103 F. Supp. 2d 1091 (S.D. Ind. 1999) (see Exhibit A, pp. 5-7).

Further, there can be little question that a prompt appellate resolution will materially advance the ultimate disposition of this litigation. As stated by the District Court, should the Seventh Circuit rule that Section 1658 is inapplicable (as Donnelley contends), entire classes of claims may be dismissed as untimely without the necessity of trial. Final resolution of the limitations period at this stage would

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[1] A ruling by this Court that the two-year statute of limitations applies to all Section 1981 claims would moot the District Court's need to analyze Class 2 claims for purposes of determining which limitations period to apply.

therefore serve the dual purposes ofjudicial economy and timely disposition of a central aspect of this litigation.

As further stated by the District court, determination of the certified issue also "is likely to have an immediate impact on almost every other aspect of this case, including the content of class notice (i.e., the class opening date); the scope of discovery... and the scope of the evidence to be heard at trial" (Exhibit B, p.2). As noted by the District Court, Plaintiffs agree that this issue has broad significance and should be resolved on interlocutory appeal.

Finally, the issue which Donnelley seeks to appeal is one of general importance which will have to be resolved by the Court of Appeals at some point. As also stated by the District Court, "actions under § 1981 are not uncommon, disputes over the appropriate statute of limitations are bound to recur, and it would be beneficial to parties and the district courts to have definitive guidance from the Court of Appeals" (Exhibit B, p. 2).

In sum, the District Court and all parties seek appellate guidance in furtherance of the orderly and timely disposition of all or a substantial portion of this ease. There are no substantial arguments against the appellate review requested by Donnelley here because interlocutory appeal will advance rather than delay ultimate disposition of this litigation. Finally, a resolution of the statute of limitation issue here will provide procedural guidance in other Section 1981 eases in this Circuit.

WHEREFORE, Donnelley respectfully requests the Court to grant permission for appeal of the statute of limitations issue certified by the District Court.

Respectfully submitted,
R.R. Donnelley & Sons

By: /s/ _____
One of Its Attorneys

RICHARD H. SCHNADIG
THOMAS G. ABRAM
LAWRENCE L. SUMMERS

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 North LaSalle Street
Chicago, Illinois 60601-1003
(312) 609-7500

GRADY B. MURDOCK, JR.
MARY A. SMIGIELSKI

Of Counsel:

EARL L. NEAL & ASSOCIATES
111 West Washington
Suite 1700
Chicago, Illinois 60602
(312)641-7144

DATED: August 2, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[June 8, 2001]

Exhibit A

JONATHAN ADAMS, et al., Plaintiffs,	)	
vs.	)	**Case No. 98 C 4025**
R.R. Donnelley & Sons, a Delaware Corporation, Defendants.	)	
**********	)	
EDITH JONES, et al., Plaintiffs,	)	
vs.	)	**Case No. 96 C 7717**
R.R. DONNELLEY AND SONS, Defendant.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In these consolidated suits, the plaintiffs, current and former African-American employees of R.R. Donnelley & Sons, a printer and provider of information services and logistics, allege employment discrimination in violation of 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e-2(a) & 3(a). The Court recently certified three classes of plaintiffs: the first consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division"; the second consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.)"; and the third consists of "All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Chicago Financial Division; or (c) the Chicago Manufacturing Division from November 1992 to the present and were subject to racial harassment so pervasive as to create a hostile working environment." *See Adams v. R.R. Donnelley,* Nos. 98 C 4025, 96 C 7717, 2001 WL 336830, at *20 (N.D. Ill. Apr. 6, 2001).

The parties have urged the Court to consider and resolve a single issue-the appropriate statute of limitations to be applied to plaintiffs' claims-arguing that resolution of this issue will in turn govern how the parties proceed on summary judgment and ultimately at trial. As framed by the parties, the question presented is whether the appropriate statute of limitations is the four-year period contained in 28 U.S.C. § 1658 (what has been referred to as the federal "catch-all" statute of limitations) or the two-year statute of limitations that governs personal injury actions in Illinois.

FACTUAL BACKGROUND

This is not the first time the statute of limitations issue has been raised in this case. Before the cases were consolidated, Donnelley moved for partial summary judgment in the *Jones* case on the ground that the claims relating to its Chicago Manufacturing Division and the claims of many of the named plaintiffs were time-barred, filed after the expiration of what Donnelley argued was the applicable statute of limitations: Illinois' two-year personal injury statute of limitations. The plaintiffs opposed the motion, arguing (among other things) that the applicable statute of limitations was the four-year catch-all period contained in § 1658. Magistrate Judge Ian Levin concluded that § 1658, by its plain language, applied only to Acts of Congress *enacted* after Deeernber 1990, not Acts *amended* after December 1990, *Jones v. R.R. Donnelley,* No. 96 C 7717, 1999 WL 33257839, at *9 (N.D. Ill. Feb, 11, 1999); because "[t]he addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658," Judge Levin reasoned, §1658 did not apply to the plaintiffs' claims. *Id.* Judge Levin therefore recommended that' Judge Williams grant Donnelley's motion for partial summary judgment with respect to all claims relating to the operation and shutdown of the CMD and all the named plaintiffs identified and designated by the defendant in its motion, *Id.* at *12.

The plaintiffs objected to the magistrate's report and recommendation, Donnelley responded, and ultimately Judge Williams denied the summary judgment motion, though she did so on non-statute-of-limitations grounds and indeed stated-

that the Court "expresse[d] no opinion on the correctness of Judge Levin's analysis of... the applicability of 28 U.S.C. §1658's four-year statute of limitations to actions brought under 42 U.S.C. §1981(b)." *Jones v. R.R. Donnelley,* No. 96 C 7717, 1999 WL 639180, at *2 (N.D. Ill. Aug. 17, 1999). In short, We are essentially writing on a clean slate on the statute of limitations issue, though, as discussed below, we are hardly the first court to consider the question.

DISCUSSION

Before 1991, §1981 read as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute, as then written, protected just two rights: the right to make contracts, which "extend[ed] only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and the right to enforce contracts, which "embrace[d] protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Patterson v. McLean Credit Union,* 491 U.S. 164, 176-

77 (1989). The Civil Rights Act of 1991, which became law (i.e., was enacted) on November 21, 1991, revised §1981, making the above-quoted language subsection (a) and adding two more subsections: subsection (b), which defined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and subsection (c), which made the section applicable to private entities. In other words, the version of §1981 in the 1991 Act created new causes of action that were not cognizable under the pre-1991 version of the statute.

Because §1981 does not contain a statute of limitations, courts considering claims under § 1981 for civil rights violations historically have applied the state personal injury statute of limitations, *see Goodman v. Lukens Steel Co.,* 482 U.S. 656 (1987); *Reed v. United Transp. Union,* 488 U.S. 319, 323-24 (1989), which in Illinois is two years, 735 ILCS 5/13-202. The question for the Court is whether this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. §1658, the federal "catch-all" statute of limitations. Section 1658 provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Looking at the plain language of §1658, this seems to this Court to be an easy question to answer, though judging by the panoply of ways in which the question has been framed and answered this is apparently a minority view. The Seventh

Circuit has yet to address the question of whether § 1658 governs claims brought under the 1991 Act; in fact only one circuit court, the Third, has actually considered, analyzed and answered the question. In *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3rd Cir. 2000), the court held that § 1658 applies "only when Congress establishes a new cause of action without reference to preexisting law ..." Thus, because Congress "chose to build upon a statutory text that has existed since 1870," the court held, "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." *Id.* at 226. The Court cannot imagine how this is possible; in *Patterson,* the United States Supreme Court clearly held that claims such as those asserted by Zubi (discriminatory firing) *did not* arise under the pre-1991 version of §1981. *See Patterson,* 491 U.S. at 177 ("the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established....). Rather, such claims can be made only by virtue of Congress' 1991 enactment of §1981(b).

The Sixth Circuit has acknowledged that this issue exists, though it has not yet decided whether §1658 actually applies to §1981 claims. In one case, the district court applied Kentucky's personal injury statute of limitations to the plaintiff's § 1981 claims without considering § 1658, and the Sixth Circuit remanded with instructions to do so. *Young v. Sabbatine*, No. 97-5169, 1998 WL 136559, at *3 (6th Cir. March 19, 1998). On remand, the district court found that § 1658 governed the claims, and although the parties tried to argue the issue on appeal, the Sixth Circuit concluded that it lacked jurisdiction to consider the question because the party

with standing to do so failed to file a notice of cross-appeal. *Young v. Sabbatine,* No. 99-6336, 2000 WL 1888672, at *2 n.2 (6th Cir. Dec. 19, 2000).

The Tenth Circuit, interestingly, has applied the state's personal injury statute of limitations to § 1981 claims without so much as discussing the possibility that § 1658 might come into play, *see Reynolds v. School District No. 1, Denver, Colorado,* 69 F.3d 1523 (10th Cir. 1995); *Roberts v. Roadway Express, Inc.,* 149 F.3d 1098 (10th Cir. 1998), which seems odd given that a number of district courts in that circuit have considered and rosolved the issue-to conflicting ends. *Compare Alexander v. Precision Machining, Inc.,* 990 F. Supp. 1304 (D. Kan. 1997) (holding that §1658 applies to claims arising out of the 1991 Act), *with Mason v. Anadarko Petroleum Corp.,* No. 97-1051, 1998 WL 166562 (D. Kan. 1998); *Lasley v. Hershey Foods Corp.,* 35 F. Supp. 2d 1319 (D. Kan. 1999); and *Hall v. Flightsafety International, Inc.,* 106 F. Supp. 2d 1171 (D. Kan. 2000) (all holding that §1658 does not apply to §1981 claims, even those arising under the 1991 Act). The Tenth Circuit *has* considered §1658's impact in the context of a §1983 claim, however, and concluded that the statute would not apply because the 1996 amendment to §1983-which merely added a right to seek injunctive relief--did not create a cause of action. *See Laurino v. Tate,* 220 F.3d 1213, 1217-18 (10th Cir. 2000). Applying this reasoning to §1981, one would think the Tenth Circuit would conclude that § 1658 would apply to claims arising under §1981(b), a post-§ 1658 enactment that *does* create a cause of action-though this is by no means a foregone conclusion.

In addition to those circuit court cases, there are about twenty-five district court decisions on the issue. A catalogue of these decisions is recounted and summarized in many of the decisions, and we will not reiterate it here. Suffice it to say, the courts have split on the issue: some (the majority) have held that §1658 does not apply to any §1981 claim, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, see, e.g., *Coleman v. Shoney's, Inc.*, - F. Supp. 2d -, No. 99-3134, 2001 WL 526673 (W.D. Tenn. March 9, 2001); *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1269 (M.D.Ala. 1998); *Hall,* 106 F. Supp. 2d 1171; *Hardin v. CNA Insurance Companies,* 103 F. Supp. 2d 1091 (S.D. Ind. 1999); some have held that §1658 applies to all §1981 claims, whether arising under the Civil Rights Act of 1991 or under the pre- 1991 version of the statute, *see Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d 974 (W.D. Ky. 1999); *Miller v. Federal Express Corp.*, 56 F. Supp. 2d 955 (W.D. Term. 1999); and some have concluded that §1981 claims may be governed by both § 1658 and the applicable state personal injury statute of limitations, depending on whether the particular claim arises under the 1991 Act or a pre-1991 version of the Act, *see Alexander,* 990 F. Supp. 1304; *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, No. 97 C 2225, 1998 WL 156674 (N.D. Ill. March 31, 1998) (same result as applied to the Telecommunications Act of 1996), We think the last holding is the only one true to the language of the statute.

"[J]udicial inquiry into the applicability of [§1658] begins and ends with what [§ 1658] does say and with what [§1658] does not." *Connecticut National Bank v. Germain,* 503 U.S. 249, 254 (1992). Settler, 1658 applies to any "civil

action arising under an act of Congress enacted" after December 1, 1990. We see nothing ambiguous in this language, at least as it relates to the claims at issue in this lawsuit. First, although some courts have found otherwise, *see, e.g., Coleman,* 2001 WL 526673, at *4; *Lane,* 13 F.Supp. 2d at 1270; *Davis v. State of California Department of Corrections,* No. S-93-1307DFL GGH, 1996 WL 271001, at * 18-* 19 (E.D. Cal. 1996), we do not think the statute's reference to "an Act of Congress enacted" is susceptible to more than one reasonable interpretation. "Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." *See also Rodgers*, 35 F.Supp. 2d at 976 ("All legislative actions of Congress, regardless of form, become law through an enactment by Congress and approval by the President."). To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight. Congress specifically used both words in the law's preamble:

An Act to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled,... Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added).

Second, there is no question that "civil action" as used in §1658 means "claim" or "cause of action." *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New 'General' One in Federal Question Cases*, 134 F.R.D. 481, 487 (1991). Finally, there is no question that "arising under" means "stemming from" or "originating in". *See* Black's Law Dictionary 102 (7th ed. 1999).

In short, the meaning of §1658 is quite simple: whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action. As applied to §1981, claims that under *Patterson* could be brought under the pro-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims. Claims that *Patterson* said could not be brought under the pre-1991 version of §1981, but which can be made only by virtue of §1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after §1658. Section 1658 applies to those claims. Having concluded that the language of the statute is unambiguous, we need not consider the statute's legislative history. See *Germain,* 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

The only other district judge in this Circuit who has addressed this issue concluded that §1658 does not apply to any claims under §1981, including claims given life by §1981(b); it relied in part on legislative history that it read as indicating that Congress did not view the Civil Rights Act of 1991 as creating any new causes of action, but rather as "restoring" §1981 to its proper scope following the Supreme Court's decision in *Patterson*. *Hardin,* 103 F. Supp. 2d at 1095. This Court does not agree. First, as indicated above, resort to legislative history is inappropriate where, as here, the language of the statute is unambiguous. But more importantly, whatever label Congress chose to give to its enactment, it was not "restoring" §1981, it was changing it. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), and in *Patterson* the Supreme Court determined not that §1981 should be narrowed despite its original intent, but rather that the statute, as enacted in 1866, was never meant to reach certain forms of conduct. *Patterson,* 491 U.S. at 176-77. When Congress enacted §1981(b), it thus undeniably created new causes of action, whether or not that is how it chose to label what it had done.

A number of courts have noted that our interpretation would result in courts applying two different statutes of limitations for every federal statute enacted prior to December 1, 1990 and amended thereafter to create now types of claims. *See, e.g., Coleman,* 2001 WL 526673, at *5; *Davis,* 1996 WL 271001, at *19. The answer to that is three-fold. First, the Court has not been asked to decide whether §1658 governs every post-1990 legislative amendment; the Court must decide

only whether the statute governs the claims raised by these plaintiffs in this lawsuit. Second, courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit. And third, even if applying multiple statutes of limitations is inconvenient, that is what Congress has required, and the courts are not at liberty to second guess an unambiguous statute.

To summarize, the Court finds that 28 U.S.C. §1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which §1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of §1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, *see Patterson,* 491 U.S. at 176-77, and are therefore governed by §1658's four-year statute of limitations. The claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling.

CONCLUSION

For the reasons explained above, the Court finds that the four-year statute of limitations in § 1658 governs those

claims created by the Civil Rights Act of 1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of §1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective classes and Donnelley's pending summary judgment motion.

Dated: June 8, 2001

/s/ _____
MATTHEW F. KENNELLY
United States District Judge

United States District Court,
Northern District of Illinois

Judge Matthew F. Kennelly

No. 96 C 7717

[July 27, 2001]

Jones vs. R.R. Donnelley and Sons

Exhibit B

(10) X [Other docket entry] Enter Order. The Court grants defendant's motion to certify (245-1) and certifies for appeal under 28 USC § 1292(b) the order of 6/8/01, and specifically the following question: whether in a 1996 lawsuit brought under 42 USC §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the"catch-all" four year period enacted by Congress in 1990 and codified at 28 USC § 1658, or the personal injury statute of limitations of the forum state.

(11) X [For further detail see order attached to the original minute order.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7717

[July 27, 2001]

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY AND SONS,
Defendant.

ORDER

MATTHEW F. KENNELLY, District Judge:

In the Court's Memorandum Opinion and Order of June 8, 2001, the Court ruled that the four-year statute of limitations in 28 U.S.C. §1658 governs the claims under 42 U.S.C. §1981 brought by the Class 1 plaintiffs (wrongful termination/failure to transfer) and the Class 3 plaintiffs (hostile work environment), rather than the two year statute of limitations governing Illinois personal injury claims. Defendant has moved the Court to certify the order for appeal under 28 U.S.C. §1292(b). Plaintiffs agree that the order should be certified for appeal.

The Court finds that the criteria for immediate appeal under § 1292(b) have been met. First, the issue of which statute of limitations applies to the claims in question is a

"controlling question of law" within the meaning of § 1292(b). If a two year statute of limitations applies to the plaintiffs' claims, that may well be dispositive of those claims.[1] Second, the issue is one "as to which there is substantial ground for difference of opinion." As discussed in the Court's Memorandum Opinion and Order, disagreement is rife among the district courts that have considered this issue, and this Court's ruling conflicts with the only Circuit-level decision, *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000). Third, an immediate appeal is likely to materially advance the ultimate resolution of this litigation. In addition to the possibility that a ruling that the appropriate statute of limitations is two years may dispose of these plaintiffs' claims, determination of these issues is likely to have an immediate impact on almost every aspect of this case, including the content of class notice *(i.e.,* the class opening date); the scope of discovery (estoppel issues, *see* fn. 1 *supra);* and the scope of the evidence to be heard at trial. Finally, the issues are of general public importance. Because actions under § 1981 are not uncommon, disputes over the appropriate statute of limitations are bound to recur, and it would be beneficial to parties and the district courts to have definitive guidance from the Court of Appeals.

The Court therefore grants defendant's motion to certify [Item 245-1] and certifies for appeal under 28 U.S.C.

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[1] It should be noted that plaintiff maintain that the Class 1 claims should survive, based on allegations of estoppel, even if a two year statute of limitations applies. If the applicable period is four years, however, the plaintiffs and the Court will be able to forego the burdensome and time-consuming task of examining the estoppel issue, possibly on a plaintiff-by-plaintiff basis.

§1292(b) the order of June 8, 2001, and specifically the following question: whether in a 1996 lawsuit brought under 42 U.S.C. §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

/s/ _____
MATTHEW F. KENNELLY
United States District Judge

Date: July 27, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRAP 5** by causing a true and correct copy of the same to be HAND DELIVERED to the following individuals on this 2nd day of August, 2001:

H. Candace Gorman
Catherine Caporusso
LAW OFFICES OF H.
CANDACE GORMAN
542 South Dearborn Street
Suite 1060
Chicago, Illinois 60605

/s/ _____
Lawrence L. Summers

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 21, 2001

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

R.R. DONNELLEY & SONS COMPANY, a Delaware Corporation,
Petitioner,

No. 01-8026 v.

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al.,
Respondents.

Petition for Permission to Appeal.
Northern District of Illinois, Eastern Division.

Matthew F. Kennelly, Judge.

The following is before the court: DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRAP 5, filed on August 2, 2001 by counsel for the petitioner.

IT IS ORDERED that the petition for leave to appeal is GRANTED. Petitioner shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Fed. R. App. P. 5(d) (1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed September 16, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,	)
v.	)
R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before RIPPLE, KANNE and EVANS, Circuit Judges.

OPINION

RIPPLE, *Circuit Judge*. Several classes of plaintiffs brought suit against their former employer, R.R. Donnelley & Sons ("Donnelley"), for race discrimination pursuant to 42 U.S.C. § 1981. Before the court is a single certified question: "Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the

appropriate statute of limitations is the 'catch-all' four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state?" R. 248 at 2. The district court determined that § 1658 provided the applicable statute of limitations for the plaintiffs' claims. Because we find ourselves in respectful disagreement with the district court, we reverse its decision and remand the case for further proceedings consistent with this opinion.

I BACKGROUND

A.

The plaintiffs are members of three classes of African-American former employees of Donnelley's Chicago Manufacturing Division, many of whom were terminated or transferred from their employment on or before July 29, 1994, in connection with the closing of that facility.[1] Their

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[1] The district court certified three classes of employees:

> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division;
>
> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1991 to the present as non-regular employees (including temporary, casual, contract,

claims against Donnelley include discriminatory transfer, discriminatory termination and racially hostile work environment. They filed their initial pleading in this case on November 25, 1996.

In its answer, Donnelley raised the statute of limitations as an affirmative defense; Donnelley claimed that the "alleged 42 U.S.C. § 1981 claims which arose more than two years prior to the filing of the complaint are barred by the applicable statute of limitations." R. 2 at 16. Soon after filing its answer, Donnelley moved for summary judgment on the claims of those plaintiffs whose employment was terminated on or around July 29, 1996.[2] According to Donnelley, this court's decision in *Smith v. City of Chicago Heights*, 951 F.2d 834, 836 n.1 (7th Cir. 1992), established that Illinois' two-year statute of limitations for personal injury claims was the

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> contingent, task force, etc.);
>
> All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Pontiac division; (c) the Chicago Financial Division; or (d) the Chicago Manufacturing Division from November 1992 to present and were subjected to racial harassment so pervasive as to create a hostile working environment.

R. 230 at 39. The present issue concerns those individuals belonging to all of the classes whose employment was terminated on or about July 29, 1994.

[2] Donnelley's motion was not confined to the statute of limitations issue, but included other issues that are not before the court on this appeal.

applicable statute of limitations for claims of race discrimination arising in Illinois and brought under 42 U.S.C. § 1981. *See* R. 10 at 2. Because the complaint was not filed until November 1996, more than two years after the plaintiffs' last employment at Donnelley, their claims were time-barred.[3]

In their response, the plaintiffs presented three reasons why their claims should be considered timely. First, the plaintiffs argued that the termination of their employment was part of a larger program of discrimination by Donnelley and that, consequently, "no statute of limitations should be imposed in this case." R.. 102 at 4. In the alternative, the plaintiffs submitted that the appropriate statute of limitations for violations of 42 U.S.C. § 1981 was the four-year statute of limitations provided in 28 U.S.C. § 1658. Specifically, the plaintiffs maintained that their claims arose under amendments to § 1981 enacted through the Civil Rights Act of 1991. Their claims, therefore, arose under the 1991 Civil Rights Act, a law enacted after § 1658, and therefore were subject to § 1658's four-year statute of limitations. Finally, the plaintiffs argued that the doctrines of equitable estoppel and equitable tolling should apply to extend the statute of limitations to allow the plaintiffs to maintain their claims.

B.

The parties eventually narrowed the issue to be resolved by the district court: The appropriate statute of

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[3] Donnelley also represented this issue at least two other times later in the litigation before the district court ruled on the motion.

limitations to apply to the claims of those plaintiffs whose employment was terminated in conjunction with the closing of the Chicago facility. The district court began its analysis by looking at the language of § 1981 prior to the adoption of the 1991 Civil Rights Act:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). The court then noted that in *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), the Supreme Court had interpreted § 1981 to protect just two rights:

> the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race."

R. 244 at 4 (quoting *Patterson*, 491 U.S. at 176-77). Consequently, after *Patterson* was handed down, § 1981 had a very limited scope that did not include claims for discriminatory termination or hostile work environment.

As part of the Civil Rights Act of 1991, the district court noted, Congress amended § 1981 to define "'make and enforce contracts' to include 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Id.* (quoting 42 U.S.C. § 1981(b)). Under this language, aggrieved employees could pursue claims of discrimination based upon events that occurred during the course of their employment.

After reviewing this evolution of § 1981, the district court turned to the question of the appropriate statute of limitations for claims brought under § 1981. The court acknowledged that courts considering claims under § 1981 historically have applied the personal injury statute of limitations of the forum state. *See id.* However, the court believed that "this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. § 1658, the federal 'catch-all' statute of limitations." *Id.* Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).[4] Noting that § 1658 applies

[4] Until July 30, 2002, § 1658 only consisted of the quoted language. However, on that date, Congress amended § 1658 by designating the quoted language as subsection (a) and adding subsection (b) which provides:

> Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of --
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 804(a), 116 Stat. 745, 801 (2002). Nothing in the amendment affects the language of now subsection (a) or the analysis of that subsection contained in this opinion.

to any "civil action arising under an Act of Congress enacted" after December 1, 1990, the district court took the view that "An Act of Congress enacted" was not "susceptible to more than one reasonable interpretation." R. 244 at 8 (internal quotation marks omitted).

"Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or

whether it was "enacted," the language of the law itself should set the record straight.

Id. (internal citations omitted). The court went on to note that the preamble to the Civil Rights Act of 1991 both defines it as "An *Act* to amend the Civil ,Rights Act of 1964 . . ." and also begins with "Be it *enacted* . . . ." *Id.* (emphasis in original and internal quotation marks omitted). The court also found it unambiguous that "arising under" meant "stemming from" or "originating in." *Id.* (internal quotation marks and citations omitted). The court concluded that the meaning of § 1658 was that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.*

The court then applied its interpretation of § 1658 to the facts presented. The court stated that § 1981 claims allowed by *Patterson* "clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims." *Id.* at 8-9. However, "claims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 9. Therefore, the district court concluded that § 1658 applies to that latter class of claims.

The court acknowledged that its decision was contrary to the only court of appeals decision to address the issue, *see Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000), as well as the majority of the district courts. Quoting the Third Circuit, the district court read *Zubi* as based on the rationale

that Congress, in enacting the 1991 legislation, had chosen "to build upon a statutory text that has existed since 1870," and therefore "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." R. 244 at 5 (quoting *Zubi*, 219 F.3d at 225-26). The district court could not "imagine how this [was] possible," because "in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by *Zubi* (discriminatory firing) *did not* arise under the pre-1991 version of § 1981." R. 244 at 5. The district court then summarized its holding:

> The Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.
>
> So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, and are therefore governed by § 1658's four-year statute of limitations. . . . *Id.* at 10-11 (internal citations omitted).

C.

After the district court issued its memorandum opinion, Donnelley requested that the court certify the issue of the appropriate statute of limitations for immediate review. Determining that the criteria for an immediate appeal pursuant to 28 U.S.C. § 1292(b) had been met, the district court granted the defendant's motion to certify the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

R. 248 at 2. By order of August 21, 2001, this court allowed Donnelley to pursue its appeal.

II DISCUSSION

To determine the appropriate statute of limitations, we must interpret two federal statutes; accordingly, we review the district court's interpretation de novo. *See, e.g., Zambrano v. Reinert*, 291 F.3d 964, 968 (7th Cir. 2002) (reviewing question of statutory and constitutional interpretations de novo); *see also Zubi*, 219 F.3d at 221 (reviewing de novo the question of the appropriate statute of limitations for § 1981 actions after the enactment of § 1658).

Prior to the enactment of § 1658, it was clear that the proper statute of limitations for § 1981 actions was the forum state's statute of limitations for personal injuries. *See Smith v. City of Chicago Heights*, 951 F.2d 834, 837 n. 1 (7th Cir. 1992) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987)). The plaintiffs maintain, however, that three intervening judicial and legislative events have occurred that alter the existing rule. First, the Supreme Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), that § 1981 only granted two discrete rights: the right to make contracts, which "extends only to the formation of a contract, but not to problems that may arise later from conditions of continuing employment," and the right to enforce contracts, which "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Id.* at 176-77. Second, in 1990, Congress enacted a uniform catch-all statute of limitations that provided a four-year statute of limitations for "civil actions arising under an Act of Congress" enacted after the effective date and for which a specific statute of limitations was not provided. Third, Congress amended § 1981 by way of the Civil Rights Act of 1991; specifically, it redefined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Because their actions "arise under" the 1991 Civil Rights Act, § 1658 provides the applicable statute of limitations.

In reply, Donnelley submits that Congress intended § 1658 to apply only to wholly new causes of action and not

those built upon existing statutory schemes. According to Donnelley, "neither the statutory language of § 1658 nor this Court's jurisprudence on statutory interpretation sanctions" the plaintiffs' reading of § 1658. Appellant's Br. at 6. We shall consider these arguments below.

As with any statutory interpretation question, determination of the meaning and application of § 1658 to the § 1981 claims at issue must begin with the statutory language of both provisions. *See Masters v. Hesston Corp.*, 291 F.3d 985, 989 (7th Cir. 2002) ("The interpretation of a statute is a question of law, which we review *de novo.*"). Prior to the adoption of the Civil Rights Act of 1991, § 1981 stated:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). Until the Supreme Court's decision in *Patterson*, courts generally interpreted § 1981 to encompass causes of action for race discrimination that occurred at any point during the employment relationship. *See, e.g., Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1430 (7th Cir. 1986) (upholding jury verdict of discriminatory treatment and termination under § 1981).

However, the Supreme Court in *Patterson* held that § 1981 should be interpreted more narrowly:

> The conduct which petitioner labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment. . .
>
> This type of conduct, reprehensible though it be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

Patterson, 491 U.S. at 179. As part of the Civil Rights Act of 1991, Congress enacted an amendment to § 1981 that "reversed" the *Patterson* decision. Specifically, Congress added a subsection to § 1981 that defined "make and enforce contracts" broadly; the current version of § 1981 states:

> § 1981. Equal rights under the law
>
> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added). Consequently, under the amended § 1981, an employee may bring a cause of action against his employer for discriminatory conduct that occurs after the employment relationship is formed.

Section 1981 does not contain its own statute of limitations. Consequently, prior to § 1981's amendment in 1991, courts applied the most analogous state statute of limitations to actions brought under that section. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987) ("Because § 1981 . . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations."). For actions brought in Illinois, this court has

determined that Illinois' two-year statute for personal injury claims is most analogous. *See, e.g., Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 807 (7th Cir. 1999), *cert. denied*, 530 U.S. 1204, 147 L. Ed. 2d 233, 120 S. Ct. 2197 (2000) (applying Illinois' two-year statute of limitations for personal injury claims to a cause of action brought pursuant to § 1981).

The plaintiffs maintain that, at least with respect to § 1981 actions that were barred by the *Patterson* decision, 28 U.S.C. § 1658 now provides the applicable statute of limitations. We look therefore to the language of § 1658 to determine if it applies to any claims brought under § 1981. Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).

Certainly, the plaintiffs' claims are "civil actions." The central question therefore is whether their claims "arise under an Act of Congress enacted after the date of the enactment of this section." The district court equated "arising under" with "'stemming from' or 'originating in. '"R. 244 at 8 (quoting Black's Law Dictionary 102 (7th ed. 1999)). In the district court's view, claims prohibited by *Patterson*, "but which can be made only by virtue of § 1981(b), . . . clearly arise under the Civil Rights Act of 1991. . . ." *Id.* In essence, the district court believed that the plaintiffs' claims "arise under" the 1991 Civil Rights Act because, by virtue of *Patterson*, those claims could not have been brought prior to the passage of the 1991 Act.

We respectfully disagree, however, that the plain language of § 1658, standing alone, compels the conclusion that § 1658 must apply to every statute subject to any amendatory action by Congress. The language of § 1658 addresses only a "civil action" that "arises under" an act adopted after § 1658's effective date. The language simply does address the eventuality when a cause of action "arises under" two different "Acts," one enacted before and one enacted after the effective date of § 1658. Consequently, we must look not only at the language of § 1658 and § 1981, but also the structure and history of those statutes to determine whether § 1658 provides the applicable statute of limitations for the plaintiffs' claims. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 326-27 (7th Cir. 1995) (stating that a court may look beyond the text of a statute where the language is ambiguous, where a literal interpretation would lead to "absurd results" or where a literal interpretation would "thwart the goals of the statutory scheme").

At the outset of our inquiry, we remain focused on the language and structure of § 1658. By its terms, § 1658 applies to civil actions "arising under an Act of Congress *enacted* after the date of the enactment of this section . . . ." 28 U.S.C. § 1658 (emphasis added). As noted by one of our sister circuits, "the phrase 'an Act of Congress enacted' after 1990 is not equivalent to the phrase 'an Act of Congress enacted or amended' after that year." *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*,

122 S. Ct. 2583 (2002).[5] "Amendments vary in their purpose, and the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." *Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000). The difficulty in discerning a technical from a substantive amendment, or an amendment that modifies an existing civil action from one that creates a wholly new one,

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[5] In *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2583 (2002), the plaintiffs had brought Title VII claims as well as § 1981 claims. With respect to the plaintiffs' Title VII claims, the Eighth Circuit ruled that because Title VII has a 300 day limitations period, the district court should have instructed the jury that Madison could only recover damages under Title VII for illegal acts occurring within the 300 day period prior to the filing of her administrative charge. Since Madison filed her charge on January 13, 1995, she was entitled to recover damages under Title VII only for acts of discrimination or harassment occurring after March 19, 1994. The court therefore erred in instructing the jury that she could recover punitive damages under Title VII for illegal acts occurring after January 13, 1993.

Id. at 797. However, in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2077 (2002), the Supreme Court held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." It was in light of its decision in *Morgan* that the Supreme Court vacated the decision of the Eighth Circuit in *IBP. See Madison v. IBP, Inc.*, 153 L. Ed. 2d 773, 122 S. Ct. 2583 (2002). The Supreme Court did not pass judgment on, or otherwise call into question, the Eighth Circuit's reasoning with respect to the § 1981 claim.

has led two of our sister circuits to reject a reading of § 1658 that would call for such guess work. According to the Eighth Circuit, "when Congress amends a preexisting statute, it does not create a 'new act, 'and claims arising under the statute as amended continue to arise under the preexisting statute. It is, thus, only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

The purpose behind § 1658 confirms the significance of the distinction drawn by the Eighth Circuit. In enacting this section, Congress sought to alleviate the uncertainty inherent in the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain their own limitations periods:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. As pointed out by the Study Committee:
>
> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

H.R. Rep. No. 101-734, at 24. Notably, Congress also was concerned with disrupting litigants' settled expectations

and therefore made § 1658 prospective. This concern is reflected in the House Report as well:

> Section 111 addresses this problem by creating a four-year fallback statute of limitations, applicable to legislation enacted after the effective date of this Act, which creates a cause of action but is silent as to the applicable limitations period.
>
> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section be made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to

> apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.

Id. We believe that Donnelley's proposed interpretation of § 1658 is most compatible with this interest in certainty and in honoring settled expectations. Under this approach, plaintiffs do not have to guess whether their action arose under the original enactment or its amendment. Section 1658, therefore, applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment.

The plaintiffs maintain that their proposed interpretation of § 1658 provides certainty and, at the same time, does not disrupt litigants' expectations. According to the plaintiffs, because the type of claims on which they seek relief did not exist post-*Patterson* and pre-§ 1981(b), there are no settled expectations to disrupt with respect to the statute of limitations to apply to such claims. "At first blush," the plaintiffs' interpretation does appear "to promise a fair degree of certainty in application"; if the newly enacted statute created a cause of action that did not exist previously, then § 1658 applies. *Zubi*, 219 F.3d at 224. "But that promise," as the Third Circuit has explained, "upon reflection, seems to us illusory." *Id.*

> First, as we have pointed out, [this] interpretation results in different statutes of limitations being applied to plaintiffs suing under the same statute depending on the particular facts of their claims. Thus, for

> example, plaintiffs who invoke § 1981 because they have been victims of discrimination in hiring will have their claims governed by one statute of limitations, while plaintiffs who invoke the same statute because they are victims of a discriminatory discharge will have their claims governed by another. Adoption of such an interpretation would seem to us to generate exactly the kind of confusion and unfairness that Congress sought to avoid.
>
> Recognition of two classes of plaintiffs under § 1981, when applied in a state with a statute of limitations for § 1981 claims larger than four years, is likely to result in unsuspecting plaintiffs who have relied on established precedent finding themselves barred from relief. Conversely, recognizing two classes, when applied in a state with a statute for § 1981 claims shorter than four years, is likely to result in defendants finding themselves faced with potential liability on claims they believed extinguished.

Id.

We believe that the Third Circuit's interpretation is most consonant with the purpose of § 1658 and the balance struck by Congress between the need for uniformity and the need to preserve settled expectations. Under this formulation,

> when an Act of Congress passed after December 1, 1990, amends a statute existing

> before that date, as opposed to creating a new law without reference to previously existing statutory language, all claims accruing after the passage of the amendment arise under an Act of Congress enacted before December 1, 1990, without regard to whether an identical claim arising earlier could have been successfully pursued under the prior statute.

Zubi, 219 F.3d at 222. Thus, it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

We now turn to the language, structure and history of § 1981 to determine whether, given the manifest intent of Congress in enacting § 1658, it is appropriate to apply the applicable state statute of limitations or the federal catch-all provision. We again begin with the language and the structure of the statute. The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discriminatory claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "arises under" § 1981(a); that subsection, not subsection (b), provides the actual right to recovery.

That this structural formation of the revised § 1981 is no accident is clear when we turn to the history of the

amendment. There is no question that reversing the *Patterson* decision was the driving force behind the enactment of § 1981(b). *See* H.R. Rep. No. 102-40 (I), at 88-92 (1991) (explaining the need to overrule *Patterson* and that the act "would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b)"). Notably, Congress chose to overrule *Patterson* not by creating an entirely new statutory provision. Indeed, Congress did not alter the original language of § 1981 (now § 1981(a)), which provides the basic right of recovery for an individual whose constitutional rights have been violated; instead, Congress merely supplied a more precise definition to one of the rights already guaranteed by § 1981 -- the right "to make and enforce contracts." Congress could have overruled *Patterson* in a number of ways. Instead of creating a wholly new cause of action, Congress merely defined the term "make and enforce contracts" for the purpose of the old § 1981, now § 1981(a). Congress' action therefore evinces a desire to tie the new cause of action to the existing § 1981.

Moreover, it is highly significant that, when Congress passed the Civil Rights Act of 1991 with the amendments to § 1981 contained therein, it believed that the applicable state statute of limitations for personal injury claims would continue to apply to § 1981 claims:

> But under 42 U.S.C. section 1981, which bars intentional race discrimination in employment as well as other contractual relations, victims have a longer period of time to commence suits. In the absence of an express limitations period in section 1981, courts applying the statute have looked to analogous state statutes

> of limitations. These statutes typically allow two or three years, and allow up to six years in some states.

H.R. Rep. No. 102-40 (I), at 63 (1991). Consequently, although Congress had enacted § 1658 the year before, it did not view its passage as having altered the practice of borrowing state statutes of limitations for purposes of § 1981.

Finally, we also are persuaded by the considered opinions of two of our sister circuits that adopted the approach set forth here. In *Zubi* and *IBP*, the Third and Eighth Circuits both concluded that § 1658 did not affect the statute of limitations for § 1981 claims such as those brought by the plaintiffs. Those courts determined that it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Zubi*, 219 F.3d at 225; *IBP*, 257 F.3d at 798 (quoting same). Because "the Civil Rights Act of 1991 was not the type of enactment Congress intended to include in the § 1658 four year limitations period," those courts applied the personal injury statute of the forum state. *IBP*, 257 F.3d at 798. We join those circuits in determining that § 1658 does not provide the applicable statute of limitations for claims of discrimination based on actions occurring after the employment relationship is formed.[6] Instead, the statute of limitations for those claims,

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[6] For the reasons set forth in this opinion, we respectfully disagree with the decision of the Tenth Circuit in *Harris v. Allstate Insurance Co.*, 2002 U.S. App. LEXIS 16509, 2002 WL 1874825 (10th Cir. Aug. 15, 2002). In *Harris*, the Tenth Circuit drew heavily from the analysis of the district court in the present case and also of the dissenting judge in *Zubi*. Specifically, relying on the

as for all § 1981 claims, remains the most analogous statute of limitations, here Illinois' two-year statute of limitations for personal injuries.

Conclusion

28 U.S.C. § 1658, as it applies to claims brought pursuant to § 1981, is susceptible to more than one textually plausible reading. Based on the text, the structure of the statutes and the legislative history of those sections, we conclude that § 1658 does not apply to the plaintiffs' claims brought pursuant to § 1981. Consequently, the judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Donnelley may recover its costs on this appeal.

REVERSED AND REMANDED

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district court's reasoning that the Civil Rights Act of 1991 was an "Act of Congress enacted" after December 1, 1990, the Tenth Circuit held that " § 1658 applies to claims brought under § 1981(b), but not to claims brought under § 1981(a)." 2002 U.S. App. LEXIS 16509, [WL] at *6-9. As noted above, however, we do not believe the plaintiffs' claims "arise under" only § 1981(b), and, therefore, courts must look to the text, structure and purpose of both § 1981 and § 1658 to determine the correct statute of limitations. When this more complete context is considered, we believe that the correct statute of limitations for all § 1981 actions is the closest analogous state statute of limitations.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed November 21, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,	)
v.	)
R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Upon consideration of the Plaintiffs-Appellees' petition for rehearing *en banc*, filed on September 27, 2002, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 19, 2003

Ms. H. Candace Gorman
542 S. Dearborn
Suite 1060
Chicago, IL 60605

Re: Edith Jones, et al., on Behalf of Herself and a Class of Others Similarly Situated
v. R. R. Donnelley & Sons Company
No. 02-1205

Dear Ms. Gorman:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ _____
William K. Suter, Clerk